

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2005-000316-001 DT

07/18/2005

HONORABLE MICHAEL D. JONES

CLERK OF THE COURT
P. M. Espinoza
Deputy

FILED: _____

PHOENIX CITY PROSECUTORS OFFICE

GARY L SHUPE

v.

MICHAEL CARROLL (001)
TIMOTHY P MCDERMOTT (001)

MICHAEL J DEW

JUDGE MICHAEL CARROLL
PHOENIX CITY COURT
300 W WASHINGTON ST
PHOENIX AZ 85003

RULING

This Petition for Special Action has been under advisement since the time of oral argument on June 15, 2005. This Court has considered and reviewed the record of the proceedings from the Phoenix Municipal Court and the excellent pleadings and memoranda submitted by counsel.

I. Jurisdiction

This Court has jurisdiction over special actions pursuant to the Arizona Constitution Article, VI, Section 18, and Rule 4(b), Arizona Rules of Procedure for Special Actions.

The exercise and acceptance of special action jurisdiction in this case is highly discretionary,¹ and therefore, the decision to accept jurisdiction encompasses a variety of determinants.² Acceptance of special action jurisdiction is appropriate where an issue is one of first impression regarding a purely legal question, is of statewide importance, and is likely to arise again. In this matter, special action jurisdiction will be exercised to resolve a purely legal

¹ *Blake v. Schwartz*, 202 Ariz. 120, 42 P.3d 6 (App. 2002); *Haas v. Colosi*, 202 Ariz. 56, 40 P.3d 1249 (App. 2002).

² *State v. Jones ex rel. County of Maricopa*, 198 Ariz. 18, 6 P.3d 323 (App. 2000).

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2005-000316-001 DT

07/18/2005

question of whether the Real Party In Interest, Timothy McDermott, is entitled to a jury trial for the charge of carrying a concealed weapon. Moreover, there is a clear issue presented here of county-wide importance to all limited jurisdiction courts, that is likely to arise again. This Court will accept special action jurisdiction in this case.

II. Factual and Procedural Background

This is a Special Action Petition from the Phoenix Municipal Court. The only issue presented in this case is whether there exists a right to a jury trial for the charge of carrying a concealed weapon. The Phoenix City Prosecutor, Petitioner herein, has charged Timothy McDermott, Real Party In Interest and Respondent herein, with carrying a concealed weapon, in violation of A.R.S. § 13-3102(A)(1), a class one misdemeanor. On April 14, 2004, the Respondent Court granted a jury trial at McDermott's request. Shortly thereafter, Petitioner requested that this Court stay the proceedings in this matter in the Phoenix Municipal Court until this special action is resolved. The Petitioner asserts that the trial judge (the Honorable Michael Carroll, Phoenix Municipal Court Judge, who is also a Respondent herein) erred in granting Timothy McDermott, the Real Party In Interest, a jury trial for the misdemeanor charge of carrying a concealed weapon.

III. Issue Presented in this Case

The Petitioner asserts that no right to a jury trial exists for the misdemeanor offense of carrying a concealed weapon pursuant to *Derendal v. Griffith*.³ Specifically, Petitioner argues that trial judge erred in (1) granting Respondent a jury trial for the misdemeanor charge of carrying a concealed weapon and (2) by ignoring previous rulings on the matter from the Arizona Court of Appeals, which found that A.R.S. § 22-320 is procedural in nature only, not granting a jury trial right to defendants charged with the misdemeanor offense of carrying a concealed weapon. The Petitioner requests that this Court reverse the Order of the Phoenix Municipal Court granting a jury trial for carrying a concealed weapon in the case at bar.

IV. Discussion of the Issues

Recently, the Arizona Supreme Court announced its decision in *Derendal v. Griffith*.⁴ There, the court was asked to consider whether Arizona should retain the previous test set out in *Rothweiler v. Superior Court*,⁵ to determine when the Arizona Constitution mandates that a criminal offense be eligible for trial by jury. In *Rothweiler*, the court fashioned a test to

³ 209 Ariz. 416, 104 P.3d 147 (Ariz. 2005).

⁴ *Id.*

⁵ 100 Ariz. 37, 410 P.2d 479 (Ariz. 1966), *overruled in part*.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2005-000316-001 DT

07/18/2005

determine whether a Defendant is entitled to a jury trial in a particular criminal offense. Under that test, the court looked to: (1) the relationship of the offense to the common law crimes; (2) the severity of the statutory penalties that apply; and (3) the moral quality of the act.⁶ In *Derendal*, the court modified the test by eliminating the moral quality element. The court held that the current analysis of jury trial eligibility of misdemeanor offense requires a two step process. First, the court must determine whether a statutory offense has a common law antecedent that guaranteed a right to a trial by jury at the time of Arizona statehood.⁷ If so, the inquiry concludes. If there is no common law antecedent for which a jury trial was required, the court must determine whether the offense is “serious” enough to warrant a jury trial.⁸

A. The Right to a Jury Trial for Misdemeanor Cases at Common Law in Arizona

Article II, Section 23 of the Arizona Constitution provides that the right to a jury trial “shall remain inviolate”, and preserves the right to a jury trial as it existed at the time Arizona adopted its constitution.⁹ Jury eligibility is firmly linked to an offense’s common law status, not a pre-statehood statutory entitlement. Thus, the Constitution requires that the state guarantee the right to a jury trial to a defendant where the offense charged was granted a jury trial at common law prior to statehood.¹⁰

Where the right to a jury trial existed for an offense prior to statehood, the right cannot be denied for modern statutory offenses of the same “character or grade.”¹¹ To constitute a common law jury-eligible offense as an antecedent to a modern offense, the modern offense must contain elements comparable to those found in the common law offenses. Mere similarity of the modern crime to a common law offense, without regard to the common law jury eligibility of that offense, is not enough.¹² Likewise, similarity between the modern offense and another modern offense for which a jury eligible common law antecedent exists is also not enough. Rather, to be jury trial eligible, the modern offense must have substantially similar elements to a common law offense that was itself jury trial eligible.

(1) The Right to a Jury Trial Prior to Arizona Statehood

It is clear that Arizona territorial law liberally granted an absolute right to a jury trial for all criminal offenses. In 1863, the United States Congress established Arizona as a Territory. Article 8 of the Territorial Bill of Rights, adopted on October 4, 1864, provided:

⁶ *Id.* at 42.

⁷ *Derendal*, 104 P.3d at 156.

⁸ *Id.*

⁹ *Derendal*, 104 P.3d at 150.

¹⁰ *Id.*

¹¹ *Id.* (quoting *Bowden v. Nugent*, 26 Ariz. 485, 491, 226 P. 549, 551 (Ariz. 1924)).

¹² See *Derendal*, 104 P.3d at 156; *Donahue v. Babbitt*, 26 Ariz. 542, 550, 227 P. 995, 997 (1924); *State v. Harrison*, 164 Ariz. 316, 319, 792 P.2d 779, 782 (App. 1990).

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2005-000316-001 DT

07/18/2005

The right of trial by jury shall be secured to all, but a jury trial may be waived by parties in civil cases in the manner prescribed by law.

The first Penal Code of 1887, also referred to as the “Howell Code,” contained the following provision, hand-written by the scrivener, regarding the conduct of misdemeanor jury trials:

Sec. 1582. Issues of fact must be tried by Jury unless a trial by jury be waived in criminal cases not amounting to felony by consent of both parties expressed in open court and entered in its minutes. In cases of misdemeanor the jury may consist of twelve or any number less than twelve upon which the parties may agree in open court.¹³

The earliest antecedent to the modern statute A.R.S. § 13-3102, prohibiting the carrying of a concealed weapon, appeared in the 1901 Penal Code. The 1901 Penal Code provided as follows:

Sec. 382. It shall be unlawful for any person (except a peace officer in actual service and discharge of his duty), to have or carry concealed on or about his person, any pistol or other firearm, dirk, dagger, slung-shot, sword-cane, spear, brass knuckles, or other knuckles of metal, bowie-knife or any kind of knife or weapon, except a pocket-knife, not manufactured and used for the purpose of offense and defense.¹⁴

With respect to jury trials, the 1901 Penal Code provided that:

Sec. 1191. A trial by jury shall be had if demanded by either the territory or the defendant; but unless such demand is made before the commencement of trial, a trial by jury shall be deemed waived.
...¹⁵

From these authorities, I conclude that the statutory right to a jury trial existed in Arizona for all misdemeanor and felony offenses prior to, and at the time of statehood. It is quite clear that jury trials for misdemeanor offenses were regularly held. However, I find that such misdemeanor jury trials were held pursuant to statutory authority, rather than common law authority.

¹³ Penal Code, Chapter VI, § 1582 (1887).

¹⁴ Penal Code, Title XI, § 382 (1901).

¹⁵ Penal Code, Title XI, § 1191 (1901).

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2005-000316-001 DT

07/18/2005

**(2) There is No Common Law Right to a Jury Trial for the Offense of
Carrying a Concealed Weapon**

If a defendant had a right to a jury trial under the common law at the time the Arizona Constitution was adopted, that right was preserved by the Arizona Constitution. As previously noted, *Derendal* makes clear that in order to qualify for jury trial eligibility, a modern offense must have a clear link to a common law offense in either exact or same grade/character. Case law illustrates that Arizona has long used broad common law concepts transported from England, as amended by parliamentary statute, as the benchmark for Arizona's common law.¹⁶ Common law is not the statutory Arizona Territorial law as it existed when the Arizona Constitution was adopted. Rather, the common law in Arizona is viewed as "the ancient, non-statutory law of England as applied and developed in the English courts [and] . . . English statutes amending this law."¹⁷ Based on the definition of "common law" as it applies in Arizona, the Respondent has failed to provide this Court with any evidence that the offense of carrying a concealed weapon required a jury trial at common law. And upon diligent research, this Court is unable to find any examples where such an offense of carrying a concealed weapon, or where any similar common law offense to the modern offense, was jury trial eligible at common law.

Moreover, the Arizona Court of Appeals has determined that carrying a concealed weapon is not a jury eligible offense. In *City of Phoenix v. Jones I*,¹⁸ the defendant was charged with carrying a concealed weapon in violation of A.R.S. § 13-911 (now A.R.S. § 13-3102) and requested a jury trial. There, the court held that no constitutional right to a jury trial existed for carrying a concealed weapon.¹⁹ Upon appeal, the court affirmed itself in holding that no jury trial right exists at common law for carrying a concealed weapon.²⁰ The court went a step further and also added that no statutory right exists pursuant to A.R.S. § 22-320²¹ for a jury trial where the punishment does not exceed six months in jail.²² The court's decision was based on the Arizona Supreme Court's holding in *Goldman v. Kautz*,²³ which had held that A.R.S. § 22-320 was a procedural statute and did not grant a substantive statutory right to a jury trial. Accordingly, this Court and the Phoenix Municipal Court are "bound by decision of the Arizona Supreme Court (and the Court of Appeals) and have no authority to overrule, modify, or disregard them Whether prior decisions of the Arizona Supreme Court are to be disaffirmed

¹⁶ See *Patterson v. Connolly*, 51 Ariz. 443, 445, 77 P.2d 813, 814 (1938); *Masury & Son v. Bisbee Lumber Co.*, 49 Ariz. 443, 68 P.2d 679 (1937).

¹⁷ *Hoyle v. Superior Court*, 161 Ariz. 224, 228, 778 P.2d 259, 263 (App. 1989).

¹⁸ 25 Ariz.App. 98, 541 P.2d 424 (App. 1975).

¹⁹ *Id.* at 100-01.

²⁰ *City of Phoenix v. Jones II*, 25 Ariz.App.265, 542 P.2d 1145 (App. 1975).

²¹ A.R.S. § 22-320 currently provides that:

A. A trial by jury shall be had if demanded by either the state or defendant. Unless the demand is made at least five days before commencement of the trial, a trial by jury shall be deemed waived.

²² *Id.* at 266.

²³ 111 Ariz. 431, 531 P.2d 1138 (1975).

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2005-000316-001 DT

07/18/2005

is a question for that court.”²⁴ Therefore, there is no statutory right to a jury trial in this case pursuant to A.R.S § 22-320, since the statute was intended to be procedural and means that a trial by jury shall be had only if demanded in cases where a jury trial is appropriate.²⁵

I conclude that there is no common law right to a jury trial for the offense of carrying a concealed weapon, and that binding Arizona case law has previously determined that no such right exists for the offense charged in this case.

B. The Right to Jury Trial Secured By Article II, §§ 23 and 24 of the Arizona Constitution

The Respondent argues that Article II, §§ 23 and 24 of the Arizona Constitution guarantees a jury trial right to all criminal defendants. Article II, Section 23, as amended in 1972, currently provides that:

The right of a trial by jury shall remain inviolate. Juries in criminal cases in which a sentence of death or imprisonment for thirty years or more is authorized by law shall consist of twelve persons. In all criminal cases the unanimous consent of the jurors shall be necessary to render a verdict. In all other cases, the number of jurors, not less than six, and the number required to render a verdict, shall be specified by law.

Article II, § 24 further provides that:

In criminal prosecutions, the accused shall have the right . . . to have a speedy public trial by an impartial jury

Specifically, McDermott requests that this Court look to the plain language of these sections and give the words their obvious and ordinary meaning. He argues that Article II, Section 23 makes no distinction between misdemeanor, felonies, or petty offenses and that, therefore, the electorate clearly chose to provide a jury “in *all* criminal cases.” Thus, McDermott urges this Court to apply the literal meaning of “all criminal cases” to this case. Such an interpretation, however, is wholly contrary to Arizona case law.

Arizona case law is clear with regard to the construction and application of the current Article II, Section 23. This section does not give the right to a jury trial but guarantees preservation of such right. In other words, the right is applicable only where it existed under

²⁴ *City of Phoenix v. Leroy's Liquors, Inc.*, 177 Ariz. 375, 378, 868 P.2d 958, 961 (App. 1993) (quoting *Myers v. Reeb*, 190 Ariz. 341, 342, 947P.2d 915, 916 (App. 1997)).

²⁵ *Goldman v. Kautz*, *supra*.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2005-000316-001 DT

07/18/2005

common law at time this section was adopted.²⁶ The constitutional guarantee of a trial by jury is not a grant, but a reservation of a pre-statehood right. Thus, only those offenses linked to jury trial at common law at the time the constitution was adopted are protected by the constitutional guarantee.²⁷

In addition, it is well established that the right to a jury trial possessed by criminal defendants under the Arizona Constitution does not apply to petty offenses.²⁸ Only the right to a jury trial for serious offenses has been preserved for criminal defendants by both the federal and state constitutions, rendering serious offenses jury trial eligible while petty offenses are not.²⁹ Therefore, Article II, Section 23 does not independently grant a right to a jury trial to all criminal defendants, but reserves the right to a jury trial for those accused of serious offenses.³⁰

In sum, the Court is unable to find any case law or legislative history that would indicate that Article II, Section 23 mandates a jury trial for the misdemeanor offense of carrying a concealed weapon. However, this Court does acknowledge the importance of the preservation of a jury trial right where such right exists. As Justice Scalia recently noted:

That right is no mere procedural formality, but a fundamental reservation of power in our constitutional structure. Just as suffrage ensures the people's ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary.³¹

In this case, however, the Court is unable to find any preservation of such a right as it existed at common law for misdemeanor offenses.

C. Carrying a Concealed Weapon is Not a “Serious” Offense

As articulated in *Derendal*, when the legislature classifies an offense as a misdemeanor, punishable by not more than six months incarceration, the offense will be presumed “petty,” falling outside of the jury trial entitlement of Article II, Section 23 of the Arizona Constitution.³² To rebut this presumption, a misdemeanor defendant must show that the offense qualifies as a “serious offense.” First, the penalty must be derived from statutory Arizona law.³³ Second, the consequence must be severe.³⁴

²⁶ *Id.*; *Rothweiler v. Superior Court of Pima County*, supra.; *State v. Cousins*, 97 Ariz. 105, 397 P.2d 217 (1964); *Brown v. Greer*, 16 Ariz. 215, 141 P. 841 (1914).

²⁷ *Benitez v. Dunevant*, 198 Ariz. 90, 7 P.3d 99 (2000).

²⁸ *Id.*

²⁹ *Raye v. Jones*, 206 Ariz. 189, 76 P.3d 863 (App. 2003).

³⁰ *Derendal v. Griffith*, supra.

³¹ *Blakely v. Washington*, 124 S.Ct. 2531, 2538-39, 159 L.Ed.2d 403, 72 USLW 4546 (2004).

³² *Derendal v. Griffith*, supra.

³³ *Id.*

³⁴ *Id.* at 154.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2005-000316-001 DT

07/18/2005

The fines, periods of maximum incarceration for the offense of carrying a concealed weapon all fall within the parameters of other misdemeanor offenses. Therefore, I find that McDermott has not met his burden in this case of overcoming the presumption that the misdemeanor offense of carrying a concealed weapon is a petty offense, and does not carry additional severe, direct, statutory consequences that would reflect the legislature's judgment that the offense is "serious" to entitle him to a jury trial.

V. Conclusion

Pursuant to the test set forth in *Derendal*, McDermott is not entitled to a jury trial in this case. The Court finds that Arizona law does not provide a constitutional right to a jury trial for the misdemeanor offense of carrying a concealed weapon, and that the Respondent Judge erred in granting the Defendant, Real Party In Interest, a jury trial. The Court further concludes that though misdemeanor jury trials regularly occurred in Arizona prior to and at the time of statehood, such jury trials were held pursuant to statutory authority. In addition, as determined by the Arizona Supreme Court, there is no modern statutory right to a jury trial pursuant to A.R.S. § 22-320 for petty offenses. Finally, I find no common law antecedent to the crime of carrying a concealed weapon where a jury trial was granted that would entitle a defendant today to a jury trial in Arizona charged with the misdemeanor offense of carrying a concealed weapon.

IT IS THEREFORE ORDERED accepting jurisdiction in this Petition for Special Action.

IT IS FURTHER ORDERED reversing and vacating the Order of the Phoenix Municipal Court granting a jury trial in this case.

IT IS FURTHER ORDERED remanding this case to the Phoenix Municipal Court for all future and further proceedings in this case.